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82-891

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHOENIX UNION HIGH SCHOOL DISTRICT; PATRICK HENDERSON; MARY K. CARR; V. A. DUNHAM, JR.; GEORGIE GOODE; DON KENNEDY and MARY PRICE,
Defendants-Appellants.

JURISDICTIONAL STATEMENT

J. WM. BRAMMER, JR., ESQ.*
DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.
240 North Stone Avenue
Tucson, Arizona 85701
(602) 623-3411
Attorneys for Appellant

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED BY THE APPEAL

The primary question presented by this appeal is whether Arizona Revised Statutes Annotated § 38-431.03 (B) is preempted by federal law. A.R.S. § 38-431.03 (1974, Supp. 1981). Section 38-431.03(B) provided that minutes of executive sessions of meetings of public bodies were to be kept confidential except from members of the public body which met in executive session. The United States Court of Appeals for the Ninth Circuit, in affirming the District Court's Summary Judgment in favor of the Government, held that this Arizona statute is preempted to the extent that it frustrates the government's congressionally mandated duty to investigate whether public programs receiving federal funds are complying with Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000(d). Federal regulations enacted pursuant to Title VI permit access to information that may be pertinent to ascertain compliance. 34 C.F.R. § 100.6(c). Appellants contend that the Arizona statute prohibits disclosure of the executive minutes to federal investigators. The Court of Appeals held that the state statute is preempted, and that the minutes should be provided to Appellee so that it may conduct its compliance investigation.

Related to the primary question presented herein is whether it is appropriate to apply a balancing test when determining if A.R.S. § 38-431.03 prohibits disclosure of executive session minutes in a Title VI compliance review. The Court of Appeals for the Ninth Circuit held that the granting or withholding of any privilege requires a balancing of competing policies. Appellants contend that an amendment to A.R.S. § 38-431.03, effective after the decision of the Court of Appeals was rendered, reveals the intent of the Arizona Legislature to grant an absolute privilege regarding minutes of executive sessions under the present circumstances.

Also related to the primary question is whether a regulation promulgated pursuant to a federal statute applying only to programs receiving federal funds can preempt a state statute which applies to public bodies regardless of whether or not they receive federal funds. Title VI and the regulations promulgated thereunder apply only to programs receiving federal funds. Phoenix Union High School District contracted with the Appellee to receive federal monies, and agreed to comply with all regulations within its power. The School District does not have the power to go beyond state statute, and thus, is not asserting a privilege which it can waive. Since A.R.S. § 38-431.03 was in effect at the time the School District contracted with the government for the funds, the government is deemed to be aware of the limitations imposed on the School District by Arizona state law.

LIST OF PARTIES

The following persons were parties to the proceeding in the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed: The United States of America, Phoenix Union High School District, Patrick Henderson, Mary K. Carr, V. A. Dunham, Jr., Georgie Goode, Don Kennedy, and Mary Price.

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JURISDICTIONAL STATEMENT

OFFICIAL AND UNOFFICIAL REPORTS

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *United States v. Phoenix Union High School District*, 681 F.2d 1235 (9th Cir. 1982).

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit is appealed to this Court pursuant to 28 U.S.C. § 1254(2). This appeal is based on the fact that the Court of Appeals held Arizona Statute § 38-431.03(B) invalid as repugnant to the laws of the United States. The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 23, 1982. Appellants'

Petition for Rehearing was denied on August 30, 1982. Notice of Appeal was filed on October 7, 1982, and the Amended Notice of Appeal was filed on November 10, 1982, in the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitution of United States:

ARTICLE VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT X

> The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.

Federal Statutes, Subchapter V—Federally Assisted Programs, 28 U.S.C. § 2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
> Pub.L. 88-352, Title VI, § 601, July 2, 1064, 78 Stat. 252.

Federal Regulations, 45 C.F.R. § 80.6(c):

> Each recipient shall permit access by the responsible department official or his designee during

normal business hours to such of his books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what effort it has made to obtain the information. Asserted consideration of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

Arizona Revised Statutes:

A.R.S. § 38-431.03 [prior to amendment].

B. Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive sessions.

A.R.S. § 38-431.03(B). [as amended, Laws 1982, 2nd Sess. Ch. 278]

B. Minutes of or discussions made at executive sessions shall be kept confidential except from members of the public body which met in executive session and from officers, appointees or employees who are the subject of discussion or consideration pursuant to Subsection A, Paragraph 1. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.
§ 38-431.07(C) [added, Laws 1982, 2nd Sess. Ch. 278]

In any action brought pursuant to this section challenging the validity of an executive session, the court may review in camera the minutes of such

executive session, and if the court in its discretion determines that such minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part of all of such minutes.

STATEMENT OF THE CASE

The Phoenix Union High School District receives federal funds from the Department of Education. As a condition of receipt of these funds, the School District agreed to comply with Title VI of the Civil Rights Act and the regulations promulgated pursuant thereto. The Office For Civil Rights, delegated the task of ascertaining compliance with Title VI, is conducting a compliance review of Phoenix Union High School District.

As part of its compliance review, the Office For Civil Rights requested access to the minutes of all executive session meetings of the Phoenix Union High School District's Governing Board. The School District denied this request in reliance on A.R.S. § 38-431.03(B), which prohibited the disclosure of executive session minutes.

On April 13, 1981, the United States, Appellee herein, filed a Complaint in the United States District Court for the District of Arizona seeking an injunction compelling disclosure by the School District of the minutes of all its executive session meetings of the Phoenix Union High School District's Governing Board.

On May 2, 1981, Plaintiff-Appellee moved for summary judgment. At that time, the questions sought to be reviewed by this Court were raised in the District Court. On July 14, 1981, the District Court entered its Order granting Plaintiff's Motion for Summary Judgment. The School District appealed that decision to the United States Court of Appeals for the Ninth Circuit, and the District Court's decision was affirmed on July 23, 1982. Defendants-Appellants' Petition for Rehearing

was denied by the United States Court of Appeals for the Ninth Circuit by its Order filed August 30, 1982. On September 13, 1982, the Court of Appeals issued its mandate.

On October 7, 1982, Defendants-Appellants filed a Notice of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit, and an Amended Notice of Appeal was filed on November 10, 1982.

SUBSTANTIAL QUESTIONS ARE PRESENTED

The questions presented to this Court are so substantial that they require plenary consideration. The primary issue before the Court is the validity of a state statute. The decisions of the lower courts in this case invalidate the application of the Arizona statute, and erodes the state's police power. The rulings in this case involve the application of the supremacy clause and the principles of preemption. As the Supreme Court has repeatedly stated when a state's exercise of its police powers is challenged under the supremacy clause, we start with the assumption that the historic police powers of the states were not meant to be superseded by federal law unless that was the clear and manifest purpose of Congress. *E.g., Ray v. Atlantic Richfield Company*, 435 U.S. 151, 157 (1978).

Police power, which would be valid if not superseded by federal action, is superseded only where the repugnance to federal law is so direct and positive that the two acts cannot possibly be reconciled. *Kelly v. Washington*, 301 U.S. 1, 10 (1937). In the current case, the relevant state and federal laws can be reconciled; thus, the State's police power should be given proper deference.

The Court of Appeals for the Ninth Circuit found that Arizona Revised Statute § 38-431.03(B) is preempted by the provisions of a federal regulation, 45 C.F.R. § 80.6 (c), promulgated pursuant to Title VI of the Civil Rights Act of 1964. The specific and plain language of the state

statute and the federal regulation does not require this interpretation. Consequently, Appellant contends that the lower courts have misapplied the law of preemption.

The Arizona statute in question is part of Arizona's Open Meeting Law, A.R.S. § 38-431 *et. seq.*, which requires public meetings for public bodies, but also allows for confidential executive sessions of those bodies for certain enumerated purposes. A.R.S. § 38-431 *et. seq.* § 38-431.03(B) now provides:

> Minutes of or discussions made at executive sessions shall be kept confidential except from members of the public body which met in executive sessions, and from officers, appointees or employees who are the subject of discussion or consideration pursuant to subsection A, Paragraph 1. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.

A.R.S. § 38-431.03(B). By use of the word "shall" the Arizona Legislature clearly has mandated that minutes of executive sessions are to remain confidential.

A.R.S. § 38-431.03 was amended, as set forth above, effective July 24, 1982, and does not appear to have been considered in its amended form by the Court of Appeals. Prior to July 24, 1982, A.R.S. § 38-431.03(B) provided simply:

> Minutes of executive sessions shall be kept confidential except from members of the governing body which met in executive session.

The Court of Appeals for the Ninth Circuit ruled that the unamended A.R.S. § 38-431.03(B) was preempted to the extent that it conflicted with federal regulation 45 C.F.R. § 80.6(c) which provided that recipients of federal funds were to permit access to its records by the Office of Civil Rights so that the Office of Civil Rights

might ascertain the recipient's status of compliance with Title VI. The specific regulation provides as follows:

> Each recipient shall permit access by the responsible department official or his designee during normal business hours to such of his books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what effort it has made to obtain the information. Asserted considerations of privacy or confidentiality *may* not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law. [Emphasis supplied.]

45 C.F.R. § 80.6(c.)

The language of this regulation, "*may* not operate to bar the Department . . ." has been interpreted by the Court of Appeals to constitute a mandate. This interpretation changes the clear language of the regulation which uses "may" rather than "shall", and turns what appears to be a conditional statement into an absolute mandate. By construing the regulation this way, the Court of Appeals concluded that there was a direct conflict between the federal regulation and the state statute, requiring a declaration that the state statute is preempted.

This interpretation of the federal regulation flies in the face of established law requiring that statutes only be preempted when it is a "physical impossibility" to find compliance with both state and federal law. *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 158 (1978).

Arizona Statute, § 38-431.03 is an exercise of the State's police power applying to all its public bodies. The Court of Appeals found that the statute should not be construed as an absolute bar to access of executive minutes, but should be construed to allow a balancing of competing interests. Appellants contend that A.R.S. § 38-431.03 as amended reveals the intent of the legislators to create an absolute bar, except under the circumstances specifically enumerated.

Since Section 38-431.03 applies to all public bodies in the State of Arizona, its interpretation is of utmost importance to the State. The Court of Appeals made its interpretation of A.R.S. § 38-431.03 before it was amended. Appellants filed a Petition for a Rehearing on the basis that the amendment revealed the Arizona legislature's intent to maintain the confidentiality of executive session minutes. Appellant's Petition was denied on August 30, 1982. Since that time, the Arizona Supreme Court has ruled on the interpretation of A.R.S. § 38-431.03(B), as amended. The Arizona Supreme Court held that executive session minutes of the Pima County Board of Supervisors could not be released to the Arizona Auditor General for purposes of its review despite a statute which required that the county make exhibits available to the auditor general. *Pima County v. Heinfeld*, No. 16223-SA, filed Nov. 12, 1982, —— Ariz. —— (1982). The Supreme Court must have the opportunity to review in a plenary fashion the application and interpretation of A.R.S. § 38-431.03.

Review in a plenary fashion is also essential to address the last related issue presented by this appeal. Title VI is of the genre referred to as "carrot and stick" legislation. Phoenix Union High School District, wishing to receive federal funds, "the carrot," must abide by the statute and its regulations. This type of legislation is well established. The case before the Court, however, presents the unusual situation where the Court of Appeals affirm-

ing the District Court has declared that a state statute is preempted as a result of the conditional receipt of funds.

Respectfully submitted,

J. WM. BRAMMER, JR., ESQ.*
DECONCINI MCDONALD BRAMMER
YETWIN & LACY, P.C.
240 North Stone Avenue
Tucson, Arizona 85701
(602) 623-3411
Attorneys for Appellant

* Counsel of Record